(2)

No. 94-931

In The

Supreme Court of the United States

October Term, 1994

BOBBY JOE LEWELLYN,

Petitioner,

vs.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY AND METROPOLITAN BOARD OF PUBLIC EDUCATION,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JAMES L. MURPHY III
STEPHEN NUNN
Counsel of Record
Metropolitan Department of Law
Attorneys for Respondents
204 Metropolitan Courthouse
Nashville, TN 37201
(615) 862-6341

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

17 pp

QUESTION PRESENTED FOR REVIEW

Whether the Sixth Circuit Court of Appeals erred in holding that a non-intentional tort by governmental actors cannot constitute a cause of action under the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983.

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Authorities iii

Statement of the Case 1

Argument 3

Conclusion 12

TABLE OF AUTHORITIES

Page

CASES

Albright v. Oliver, 510 U.S. ___, 114 S.Ct. ___, 127 L.Ed.2d 114 (1994) 4

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) 7, 8

Bradenburg v. Cureton, 882 F.2d 211 (6th Cir. 1989) 5

Braley v. City of Pontiac, 906 F.2d 220 (6th Cir. 1990) 5

Cassady v. Tackett, 938 F.2d 693 (6th Cir. 1991) 5

Collins v. City of Harker Heights, 503 U.S. ___, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992) ..... *passim*

Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) 3, 4, 8

Davidson v. Cannon, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986) 8

DeShaney v. Winnebago Soc. Serv., 489 U.S. 189, 109 S.Ct. 988, 103 L.Ed.2d 249 (1989) 3, 6, 8, 9

Donovan v. City of Milwaukee, 17 F.3d 944 (7th Cir. 1994) 6

Dorothy J. v. Little Rock School District, 7 F.3d 729 (8th Cir. 1993) 6

Fagan v. City of Vineland, 22 F.3d 1296 (3rd Cir. 1994) 6

Harris v. District of Columbia, 932 F.2d 10 (D.C. Cir. 1989) 6

TABLE OF AUTHORITIES – Continued

Page

Jones v. Sherrill, 827 F.2d 1102 (6th Cir. 1987) 5

Monahan v. Dorchester Counselling Center, Inc., 961 F.2d 987 (1st Cir. 1992) 6

Nishiyama v. Dickson County, 814 F.2d 277 (6th Cir. 1987) 3, 4, 5, 6, 7

Nobles v. Brown, 985 F.2d 235 (6th Cir. 1982) 6

Pitchell v. Cullan, 13 F.3d 545 (2d Cir. 1994) 6

Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952) 6, 11

Salas v. Carpenter, 980 F.2d 299 (5th Cir. 1992) 6

Walker v. Rowe, 791 F.2d 507 (7th Cir. 1986) 10

Weller v. Dept. of Soc. Serv. for Baltimore, 901 F.2d 387 (4th Cir. 1990) 6

Woodrum v. Woodward County, 866 F.2d 112 (9th Cir. 1989) 6

STATUTES

42 U.S.C. § 1983 ..... 3, 7

RULES

Rule 56, Fed. R. Civ. P. 7

STATEMENT OF THE CASE

Petitioner's statement of the case is accurate in most respects. However, at certain points the petitioner either drifts into argument beyond the fair implication of the facts stated in Appendix F to his Petition, or fails to present a balanced statement of the proof.

On pages 7, 10 and 11 of the Statement of the Case, petitioner repeatedly argues that Metro Schools made no effort to halt construction of the Tulip Grove Elementary School Building, despite a contractual right to do so and despite knowledge that an open electrical conductor to the adjacent school was open and active. Petitioner makes argumentative characterizations that Metro acquiesced in and encouraged construction under the open conductor. **Pet. at 7.** Petitioner also asserts that Metro Schools had full knowledge that the roofing was taking place within seven (7) feet of the conductor. **Pet. at 9-10.**

As stated in the stipulation of the parties, **Pet.,** Appendix F, and in the factual findings of the Sixth Circuit Court of Appeals and the U.S. District Court, there is no dispute that Metro Schools was aware that Tulip Grove Elementary School was under construction before the overhead electrical conductor was relocated as called for in the contract documents. Petitioner has omitted the undisputed fact, noted by the Sixth Circuit, **Pet.,** Appendix B at 6a, that Metro Schools relied upon its architect to monitor safety conditions. Further, nowhere in the stipulation or in the record is it stated that Metro Schools was aware that the electrical conductor was only seven (7) feet from the roof of Tulip Grove Elementary

School prior to Mr. Lewellen's accident. The only balanced reading of the facts is that although it could readily be seen that the roofing was under the conductor, it was not known that the roof was only 7 feet below it.

Petitioner references provisions of the contract between Metro Schools and the general contractor regarding Metro's right to stop work and withhold payment for defective work or failure to pay third parties. **Pet. at 9.** The petitioner omitted reference to the provisions which made the general contractor generally responsible for job safety, which provisions were mentioned in the opinions of the U.S. District Court, (**Pet.**, Appendix C at 22a) and the Sixth Circuit Court. (**Pet.**, Appendix B at 6a).

Finally, the petitioner overstates and mischaracterizes the position and policy of Metro Schools with respect to removal of the electrical conductor and changeover to the new conductor at the adjacent Two Rivers Middle School. In the equivalent of a jury speech, petitioner states that Metro Schools would "not allow" the conductor to be neutralized and moved, despite knowledge of danger to the workers. (**Pet. at 9-10**). As stated in the findings of the Sixth Circuit (**Pet.**, Appendix B at 5a) and the U.S. District Court (**Pet.**, Appendix F at 106a and 107a), a dispute arose around the issue of payment for the changeover of electric power from the old conductor, which passed over a portion of the roof of the Tulip Grove School, to the new conductor, which avoided the roof. The changeover would take at least six to eight hours, necessitating the cut-off of power to Dupont School. Metro Schools refused to permit closure of the school on a regular school day. In order to perform the

changeover on a weekend or holiday, Nashville Electric Service demanded payment of overtime costs for its workers, the cost of which was estimated to be between $600.00 and $1,000.00. Despite its contractual obligation to pay utility charges, the general contractor refused to pay that cost. Metro Schools refused to pay due to the contractual provisions which reflected its policy not to pay additional cost for utility work. Unfortunately, that dispute was not resolved until the agreement was reached that the changeover would be done during school Christmas holidays, on December 29, 1988.

ARGUMENT

This Court should refuse to grant certiorari in this case. The Sixth Circuit, in its consideration of the facts of the case, correctly applied the principles established by this Court in *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *DeShaney v. Winnebago Soc. Serv.*, 489 U.S. 189, 109 S.Ct. 988, 103 L.Ed.2d 249 (1989); and *Collins v. City of Harker Heights*, 503 U.S. ___, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). Petitioner complains at length that the Sixth Circuit improperly limited the effect of its earlier ruling in *Nishiyama v. Dickson County*, 814 F.2d 277 (6th Cir. 1987), but respondents contend that regardless of whether this Court agrees with the Sixth Circuit's assessment of *Nishiyama*, that court properly disposed of petitioner's appeal in the instant case.

Petitioner begins his argument by properly stating the analytical framework for determining whether a plaintiff has properly stated a case under 42 U.S.C. § 1983

and the due process provision of the Fourteenth Amendment. However, the petition soon goes astray in its assertions that Mr. Lewellen's cause of action, as alleged and fleshed out by the facts and stipulations, can survive that analysis.

As this Court made clear in *Collins, id.*, a two-prong analysis must be made to determine if a claim has been alleged against a municipality. First, a court must decide whether a constitutional violation led to plaintiff's injury; and second, whether the municipality is responsible. *Collins,* 117 L.Ed.2d at 270. The District Court and the Sixth Circuit properly employed that analysis and determined that Mr. Lewellen could not prove that his injuries resulted from a constitutional violation. Therefore, there was no need to consider the second question of municipal responsibility.

In reaching its decision, the Sixth Circuit emphasized that the guarantee of substantive due process of law, applicable through the Fourteenth Amendment, protects individuals from the arbitrary exercise of governmental authority. (Appendix B at 9a). *Albright v. Oliver,* 510 U.S. ___, 114 S.Ct. ___, 127 L.Ed.2d 114 (1994). Intentional arbitrary acts clearly come within the proscription of the Constitution, while negligent acts are outside its scope. *Daniels v. Williams. Id.*

As respondents understand it, the petitioner argues that this Court should grant certiorari so that he can argue that the instant case should be controlled by the principle enunciated by the Sixth Circuit in *Nishiyama, id.*, specifically that gross negligence on the part of governmental officials can rise to a violation of substantive due

process. In effect, petitioner asks this Court to make *Nishiyama* the law of the land. Respondents contend that such a step is ill-advised and unnecessary.

Petitioner characterizes the Sixth Circuit's opinion in this case as an "abrupt departure" from its prior holdings and at odds with the majority view of the federal circuits. (Pt. at 14) That argument is wrong in both respects.

In subsequent decisions, the Sixth Circuit had carefully limited its holding in *Nishiyama* to the type of outrageous conduct exhibited in that case. As the court stated in *Jones v. Sherrill*, 827 F.2d 1102 (6th Cir. 1987):

> The facts alleged in support of the legal conclusion of gross negligence must be sufficient to charge the government officials with outrageous conduct or arbitrary use of government power.

827 F.2d at 1106.

The Sixth Circuit has further delineated limits on liability for outrageous conduct in *Bradenburg v. Cureton*, 882 F.2d 211, 214-215 (6th Cir. 1989) (negligent preparation for violent arrest); *Braley v. City of Pontiac*, 906 F.2d 220, 226-227 (6th Cir. 1990) (malicious prosecution); *Cassady v. Tackett*, 938 F.2d 693, 697-698 (6th Cir. 1991) (threat to kill by jailer). Thus, prior to its decision in the instant case, the Sixth Circuit recognized that its analysis that gross negligence can be tantamount to intentional,

arbitrary action was not to be construed as broadly applicable. *Nobles v. Brown*, 985 F.2d 235, 238 n.1 (6th Cir. 1992).[1]

Petitioner's claim that the majority of federal circuits have supported the *Nishiyama* rule on gross negligence is likewise misguided, relying as it does on *Woodrum v. Woodward County*, 866 F.2d 1121 (9th Cir. 1989) – a case decided prior to *DeShaney* or *Collins*. Indeed, federal circuit cases decided since *DeShaney* and/or *Collins* have tended to find that intentional arbitrary action rather than non-action or unintentional action is minimally required to state a cause of action in non-custodial settings. *See Harris v. District of Columbia*, 932 F.2d 10, 14-16 (D.C. Cir. 1989); *Monahan v. Dorchester Counselling Center, Inc.*, 961 F.2d 987, 990-994 (1st Cir. 1992); *Pitchell v. Cullan*, 13 F.3d 545, 549 (2d Cir. 1994); *Fagan v. City of Vineland*, 22 F.3d 1296, 1306-1307 (3d Cir. 1994); *Weller v. Dept. of Soc. Serv. for Baltimore*, 901 F.2d 387, 391-392 (4th Cir. 1990); *Salas v. Carpenter*, 980 F.2d 299, 307-308 (5th Cir. 1992); *Donovan v. City of Milwaukee*, 17 F.3d 944, 955 (7th Cir. 1994); and *Dorothy J. v. Little Rock School District*, 7 F.3d 729, 733-734 (8th Cir. 1993).

When viewed in the light of subsequent decisions, the Sixth Circuit's ruling in *Nishiyama v. Dickson County, Id.*, is best understood as a case in which the defendant's actions shocks the conscience of the court, *see Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952),

---

[1] Even if Lewellen represents an "abrupt" departure from prior law, that is precisely the action that lower courts should take in response to principles of law established by the U.S. Supreme Court.

rather than a decision which adopted a formula for subsequent use through which non-intentional actions could lead to liability. Indeed, the actions of the defendants in *Nishiyama*, including the unsupervised permissive use of an official county sheriff's vehicle by a dangerous felon, coupled with ignoring reports that he was stopping unsuspecting motorists, could be found to bear the earmarks of arbitrary use of governmental authority. In any event, the facts in that case are quite different than those present in the instant case, and a decision on the facts of the ruling in *Nishiyama*, is not necessarily relevant to this Court's determination of whether it should grant certiorari.

Petitioner next contends that the Sixth Circuit simply misconstrued the holding in *Collins v. City of Harker Heights*, and that *Collins* actually supports his case. Petitioner bases that argument on its reading that *Collins* does not preclude liability under 42 U.S.C. § 1983, based upon gross negligence. Petitioner further claims that he has made the allegations that the plaintiff failed to make in *Collins*. Specifically, petitioner argues that he has alleged that intentional acts by Metro Schools violated his rights.

Petitioner's reliance upon his pleadings is misplaced for two reasons. First, when it considers a Rule 56 motion in a case that has progressed past the pleadings stage, and which includes a record with material evidence bearing on the allegations, a court must examine that evidence, as well as the pleadings. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252-255, 106 S.Ct. 2505, 91 L.Ed.2d 202, 214-216 (1986). In view of the substantive law of this case as established by *Collins, id.*, a court must examine the proof to determine whether a recognized constitutionally-

guaranteed right has been violated. *Anderson v. Liberty Lobby, Inc., supra,* 477 U.S. 248.

Second, these conclusory allegations fall well short of what this Court required in *Collins,* which is an allegation tantamount to "deliberate harm." 503 U.S. at ___, 112 S.Ct. at 1068-69, 117 L.Ed.2d at 273. Nowhere in the relevant allegations of the amended complaint can a factual predicate for any intention on the part of Metro Schools to cause deliberate harm to Mr. Lewellen be found.

As the District Court and the Sixth Circuit stated, the substantive law of the instant case is established by *Collins v. City of Harker Heights, supra; DeShaney v. Winnebago Soc. Serv., supra;* and *Daniels v. Williams, supra.* As in *Collins,* the issue in this case is whether petitioner can show that he received injury because of a constitutional violation.

The plaintiff's claim in *Collins* was characterized as a deprivation of Mr. Collins' life and liberty by failing to provide him with a reasonably safe work place. This Court stated that plaintiff's theory that a city has a constitutionally-guaranteed obligation to provide its employees with a certain minimal level of safety and security was unprecedented and without support in prior Supreme Court case law. The Fourteenth Amendment's substantive due process clause has heretofore been construed as a limitation on a government's authority to act in an oppressive manner or to abuse its power, but not as an instrument to generally impose an affirmative obligation to guarantee any minimal level of safety and security. *Davidson v. Cannon,* 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d

677 (1986); *DeShaney v. Winnebago Soc. Serv. Id.* The obligation to assure safety and security is only imposed for the benefit of persons who have been deprived of liberty by a government and who find themselves in government custody of one type or the other. This guarantee was not available to Mr. Collins since acceptance of an offer of employment cannot be characterized as deprivation of liberty. *Collins* at 112 S.Ct. at 1070, 117 L.Ed.2d at 275.

This Court dismissed plaintiff's allegation of arbitrary municipal action by stating that even if the city failed to adequately train its employees or warn them of a known risk of injury, that omission did not shock the court's conscience so as to be arbitrary in the constitutional sense. The decision regarding arbitrariness in the constitutional sense was founded upon its presumption that administration of programs by local governments involves a balance of policy choices and allocation of resources, particularly when it comes to such matters as the training of employees. Therefore, even if the city provided insufficient training, that failure was not the type of arbitrary action that implicates substantive due process of law. For the same reasons, this Court refused to raise the city's denial of a liberty interest created by the Texas OSHA statute to the level of a constitutional deprivation protected by the substantive due process clause. 503 U.S. at ___, 112 S.Ct. at 1070-71, 117 L.Ed.2d at 275-76.

The factual similarities between this case and *Collins* are clear. If anything, the City of Harker Heights was more blameworthy than Metro Schools because it directed its own employee into a dangerous sewer ditch without proper training and equipment. In contrast, the policies, and customs which the petitioner lists involve a

failure to take certain steps or use its governmental power to the fullest extent to protect workers employed by independent contractors, such as Mr. Lewellen, from the admittedly dangerous condition that was allowed to exist, by allowing construction to proceed too close to the uninsulated electric conductor. For example, Mr. Lewellen argues that Metro failed to closely monitor the construction site for electrical safety violations; that Metro tried to delegate that responsibility by contract; that Metro refused to close the adjacent school during a school week for electric changeover or make overtime payments to the electric service for weekend work; and that Metro failed to exercise its authority to stop work on the job so that the dangerous condition could be rectified. In essence, petitioner claimed that Metro did not provide a safe workplace. However, after *Collins, id.*, such claims cannot survive constitutional analysis.

Petitioner then argues that his claims are also based on arbitrary action. As the courts below noted, Metro Schools' actions cannot be called arbitrary in the constitutional sense. Petitioner's allegations and facts cannot, as a matter of law, rebut the presumption of reasonableness stated in *Walker v. Rowe*, 791 F.2d 507 (7th Cir. 1986), and approved by the Supreme Court in *Collins, supra.* In fact, the stipulations (Appendix F) only reinforce that presumption. During 1988, Metro Schools was in the process of building seven (7) new schools and planning fourteen (14) others. Presumably, staff resources had to be allocated to certain functions, and intensive monitoring of job site safety was not one of those functions. Therefore, it was not arbitrary, in the constitutional sense, to assign

protection of worker safety to the general contractor, even if Tennessee law states the duty is non-delegable.

With respect to Metro's policies affecting electric service changeover, Metro maintains that they cannot be arbitrary in the constitutional sense. The school system's primary duty is to instruct students; thus, it simply cannot be arbitrary to refuse to allow electricity to be shut off during school hours. The proof is clear that a power shut-off of several hours was necessary to change the power lines, if all went well. Further, the duty to pay N.E.S.'s overtime charges was placed on the contractors and presumably was included in their bids. Refusal to, in effect, pay twice for the same work can hardly be arbitrary.

Further, by emphasizing the $600.00 to $1,000.00 cost of N.E.S.'s overtime, petitioner departs from the inquiry required by *Collins*. At no point did this Court say that the size of the allocation of resources is at all relevant to the arbitrariness inquiry. This Court could have easily said that it needed to know what the cost of employee training might be, or how much city resources might be consumed in warning employees of sewer gases. However, it did not make that inquiry, and moreover held it to be irrelevant and beyond the court's scope. Therefore, Metro's acts and omissions under the policies relied upon by petitioner do not bear the stamp of arbitrary acts. Nor do they approach the type of acts that shock the conscience of the courts. *Rochin v. California. Id.*

CONCLUSION

The District Court and the Sixth Circuit were correct in their decisions – this is essentially a negligence action. Therefore, there is no basis to grant certiorari in this case.

Respectfully submitted,

JAMES L. MURPHY III
STEPHEN NUNN
Counsel of Record
Department of Law of the
Metropolitan of Nashville and
Davidson Counties
Attorneys for Respondents
204 Metropolitan Courthouse
Nashville, TN 37201
(615) 862-6341